LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 23 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 285

GEORGE F. GLACY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

EDWARD O. PROCTOR,
225 Franklin Street,
Boston, Massachusetts 02110,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

Citation to opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Reasons for granting the writ	4
1. Insufficiency of the indictment	4
2. Conversion of the railroad's property	5
Conclusion	6
Appendix A	7
Appendix B	8
Appendix C	18

Table of Authorities Cited.

CASES.

Golden v. United States, 318 F. 2d 357	6
Groves v. United States, 343 F. 2d 850	6
Heath v. United States, 209 F. 2d 318	6
Hudson v. United States, 55 F. 2d 591	6
Kramer v. United States, 190 F. 2d 712	6
Russell v. United States, 369 U.S. 749	4
United States v. Boston & Maine Railroad, 380 U.S. 157	3n.
United States v. Johnston, 268 U.S. 220	6
Van Liew v. United States, 321 F. 2d 664	5

STATUTES, ETC.

Clayton Act, Oct. 15, 1914, c. 323, § 9	6
18 U.S.C. § 641	6
18 U.S.C. § 660	2, 3, 5, 6
28 U.S.C. § 1254 (1)	2
U.S. Rev. Stats. Title LXII, c. 3, § 5209	6
Rules of the Supreme Court of the United States, Rule 22 (2)	2

Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

GEORGE F. GLACY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner George F. Glacy prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on May 25, 1966.

Citation to Opinion Below.

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra,* p. 8, is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 25, 1966 (Appendix C, p. 18, *infra*). The jurisdic-

tion of this Court is invoked under 28 U.S.C. § 1254 (1). The filing of the petition is governed by Rule 22 (2) of the Rules of this Court.

Questions Presented.

1. Where the indictment charges that the three defendant railroad officials did, by arranging a transaction pursuant to which ten of the Boston & Maine Railroad's coaches were sold to International, a fourth defendant, for $250,000, "wilfully misapply, and wilfully permit to be misapplied moneys, funds, credits, securities, property and assets of the said B&M . . . and did wilfully convert to their own use moneys, funds, credits, securities, property and assets of the said B&M, to wit, $71,500; in violation of Section 660, Title 18, U.S. Code," which violation was effectuated by causing the sale of the coaches for an inadequate price to International, which resold them at a profit, out of which International gave the said defendants in varying amounts $71,500; whether the indictment intends to charge misapplication of the coaches as well as conversion of the moneys received from the proceeds of their resale; and whether this sufficiently specifies an offense against the United States.

2. Where railroad officials arrange to sell ten of the railroad's coaches for $250,000 to a third party, which resells them for $425,000, out of which it gives $71,500 in varying amounts to said officials, who take the same for their own use and not as agents of the railroad; whether the receipt thereof can constitute a conversion of the railroad's property; and whether the Court of Appeals erred in holding that these moneys were "proceeds *which, in law, belonged to the railroad*" (Opinion, *infra*, p. 11).

Statute Involved.

The statutory provision involved is 18 U.S.C. § 660, under which the indictment was laid. It is printed in Appendix A, *infra*, p. 7.

Statement.

Count Two of the indictment (R. 17-21)* charges a violation of 18 U.S.C. § 660, and alleges that the defendants McGinnis, Glacy and Benson, officers of the Boston & Maine Railroad, wilfully misapplied and wilfully permitted to be misapplied moneys, property and assets of the Boston & Maine Railroad, and wilfully converted to their own use moneys of said Boston & Maine Railroad, "to wit, $71,500" (R. 18-19). In brief, it charges that this was accomplished by the said three defendants' arranging to sell ten stainless-steel cars belonging to the railroad to the defendant International Railway Equipment Corporation for the sum of $250,000; that on the day after title passed to International that corporation resold the coaches to another railroad for $425,000; that $71,500, almost all of which came out of the proceeds of this resale, was paid over on various dates in various amounts to McGinnis, Glacy and Benson (R. 19-20); and, finally, that these individual defendants withheld the said moneys from the Boston & Maine. The defendants International and its principal officer, Mersey, are charged with aiding and abetting McGinnis, Glacy and Benson in the perpetration of the alleged crime (R. 20).

All of the defendants filed motions to dismiss the indictment as to Count Two. The motions were denied by the trial judge (R. 38-39).

---

*The case went to trial on two counts, Count 1, which was before this Court, *United States* v. *Boston & Maine Railroad*, 1965, 380 U.S. 157, was dismissed on motion of the Government in the course of the trial (R. 108, 109).

The case was tried at length before a judge and jury. At the close of the evidence the defendants presented motions for judgments of acquittal (R. 729-744). These were denied (R. 676-677; and see R. 12).

*Briefly, at the trial, the Government showed that defendant officers presented to the railroad's board of directors a proposal to sell ten stainless-steel passenger cars for $250,000, an unreasonably low price, and obtained approval by false statements of what similar cars were selling for; that they caused the cars to be sold for that price to Mersey,† the railroad receiving payment only after Mersey had sold to another road, which was already committed to buy for $425,000; that Mersey thereafter paid the defendant officers, individually and respectively, $35,000, $25,000 and $11,500, or a total of $71,500, much of which was actual proceeds of the sale.

The jury found all the defendants guilty (R. 705).

The cases went to the Court of Appeals on the appeals of all the defendants from the judgments of the District Court entered against them, which sentenced the individual defendants to eighteen months in prison and imposed fines upon them in addition thereto, as well as upon the defendant International (R. 13-14; and see R. 746-752 (judgments) and 753-757 (appeals)). The Court of Appeals affirmed (Appendix B, *infra*, p. 17).

Reasons for Granting the Writ.

1. Insufficiency of the Indictment.

The decision of the court below is in conflict with *Russell* v. *United States*, 369 U.S. 749.

---

*We take this brief statement of the Government's evidence from the Court of Appeals opinion, Appendix B, *infra*, at p. 9.

†Actually, Mersey's company, International.

It is uncertain whether the indictment charges both misapplication of the coaches and conversion of the proceeds of their resale. If it does, it presents two inconsistent charges. The defendant has a constitutional right to know what offense he is charged with. *Van Liew* v. *United States,* 321 F. 2d 664 (5th Cir. 1963).

2. Conversion of the Railroad's Property.

The Court of Appeals decision upholds the trial judge's instructions permitting the jury to find that the defendant Boston & Maine officers were guilty of criminal conversion of the railroad's property when they received from International moneys aggregating $71,500 out of the proceeds of International's resale of the cars (Charge, R. 683, 684, 700), at the same time instructing the jury that these moneys which International received from the sale of the cars "became the moneys of International" (R. 700).

The Court of Appeals expressly holds that the proceeds of the resale by International paid over to the defendant officials "in law, belonged to the railroad" (Op. *infra,* p. 11).

Petitioner contends that the language of section 660, a criminal statute to be strictly construed, expressly defines the crime as misapplication or conversion of the carrier's assets, and that a "kick-back" from the purchaser cannot be a conversion of the carrier's assets, because the carrier had no property right therein.

The fiduciary duty of the railroad officials to account did not create in the railroad a property right in the proceeds of the resale.

We believe that this decision conflicts with many other decisions dealing with misapplication or conversion of an employer's property.

While there are no decisions construing this language of 18 U.S.C. § 660 (originally enacted as section 9 of the Clayton Act, October 15, 1914, c. 323, § 9), there are numerous decisions under the banking statute, from which it was derived (U.S. Rev. Stats. Title LXII, c. 3, § 5209), which have uniformly held that a conversion of the bank's assets can only be of assets in which the bank has a property interest. *Golden* v. *United States,* 318 F. 2d 357, 361 (1st Cir. 1963). *Hudson* v. *United States,* 55 F. 2d 591, 594 (8th Cir. 1932). *Kramer* v. *United States,* 190 F. 2d 712, 717 (4th Cir. 1951). *Groves* v. *United States,* 343 F. 2d 850, 851 (8th Cir. 1965). The decisions are to the same effect under 18 U.S.C. § 641, making embezzlement from the United States a crime. *Heath* v. *United States,* 209 F. 2d 318 (9th Cir. 1954). *United States* v. *Johnston,* 268 U.S. 220 (1925).

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD O. PROCTOR,
Counsel for petitioner.

Appendix A.

Title 18, United States Code.

Section 660. Carrier's funds derived from commerce; State prosecutions.

Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred but also in any district in which the defendant may have taken or had possession of such moneys, funds, credits, securities, property or assets.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts. (June 25, 1948, ch. 645, 62 Stat. 730.)

Appendix B.

United States Court of Appeals
For the First Circuit

No. 6652.

GEORGE F. GLACY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6653.

DANIEL A. BENSON,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6662.

HENRY MERSEY ET AL.,
DEFENDANTS, APPELLANTS,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6666.

PATRICK B. MCGINNIS,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Edward O. Proctor for George F. Glacy, appellant.

Claude B. Cross, with whom *John M. Reed* and *Withington, Cross, Park & McCann* were on brief, for Daniel A. Benson, appellant.

Edward F. Myers, with whom *Cornelius J. Sullivan* and *Holtz, Sullivan & Zonderman* were on brief, for Henry Mersey et al., appellants.

William T. Griffin, with whom *Lawrence R. Cohen* and *Newton H. Levee* were on brief, for Patrick B. McGinnis, appellant.

John F. Dougherty, Attorney, Department of Justice, with whom *Donald F. Turner*, Assistant Attorney General, *W. Arthur Garrity, Jr.*, United States Attorney, and *Howard E. Shapiro* and *Richard A. Wegman*, Attorneys, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT.

May 25, 1966.

ALDRICH, *Chief Judge*. The defendants, McGinnis, Glacy, and Benson, president, vice-president in charge of finance and accounting, and vice-president in charge of operations, respectively, of the Boston & Maine Railroad, were convicted of misapplying[1] assets of the railroad. Defendants Mersey and International Railway Equipment Corporation, hereinafter collectively, Mersey,[2] were convicted of aiding and abetting. We will deal with the evidence later at more length. Briefly, the government showed that defendant officers presented to the railroad's board of directors a proposal to sell ten stainless steel passenger cars

---

[1] "[E]mbezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets . . . or willfully or knowingly converts the same to his own use or to the use of another. . . ." 18 U.S.C. §660.

[2] Mersey was the principal officer and representative, as well as sole stockholder of International.

for $250,000, an unreasonably low price, and obtained approval by false statements of what similar cars were selling for; that they caused the cars to be sold for that price to Mersey, the railroad receiving payment only after Mersey had sold to another road which was already committed to buy for $425,000; that Mersey thereafter paid the defendant officers, individually and respectively, $35,000, $25,000 and $11,500, or a total of $71,500, much of which was actual proceeds of the sale.[3] All defendants moved unsuccessfully for a dismissal of Count 2 of the indictment, the one on which they were convicted,[4] and for directed verdicts of acquittal for joint and, in most instances, individual reasons. The appeals raise certain further issues.

A basic matter, which defendants presented in various manners,[5] is a supposed distinction between misapplying the cars and misapplying the proceeds. We are unimpressed, as was the district court, whose analysis of the issue and exposition to the jury was a model of simplicity and clarity.

The offense charged was the improper sale at a known inadequate price,[6] to a fraudulent middleman,[7] with de-

---

[3] The fact that the proceeds could be specifically traced becomes relevant in a later matter, but does not enter into our decision that the offense was made out.

[4] Count 1, after having gone to the Supreme Court, *United States* v. *Boston & Maine R.R.*, 1965, 380 U.S. 157, was dismissed during trial.

[5] The defendants' attacks on the indictment, demands for particulars, motions for acquittal and a number of their refused requests for instructions, directly or indirectly raised this issue.

[6] It is this aspect of the case that distinguishes it from the state decisions cited by the defendants. We agree that the agents there entrusted to sell property, whether potatoes, watermelons, bonds, stock, automobiles, or spreaders, could not be convicted of conversion of the proceeds on a charge of converting the property. In

[7] (See opposite page.)

fendants' intended acquisition and retention of the proceeds, all part of the one grand design. The statute is not restricted to technical embezzlement, but embraces the broader concept of misapplication. *Cf. Batchelor* v. *United States,* 1895, 156 U.S. 426; *United States* v. *Mulloney,* D. Mass., 1934, 8 F. Supp. 674, *aff'd,* 79 F.2d 566, *cert. den.* 296 U.S. 658; *Kramer* v. *United States,* 4 Cir., 1951, 190 F.2d 712, 717-18. The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad.[8]

---

those cases the sales were fully authorized. In the case at bar if defendants' only misconduct had been to intercept and pocket proceeds of an honest sale, the present indictment would have been inappropriate. But that is not this case. The defendants were charged with a larger offense. The district court's instruction laid this issue on the line.

> "If what these defendants did was bad judgment in selling the cars at the price for which they sold them, or was stupidity and nothing more, then they are not responsible. They have a wide degree of latitude in the exercise of their judgment. But willfulness means that they intended to do what they did, and did it voluntarily, and with a specific intent, or bad purpose, the bad purpose being to line their own pockets at the expense of the Boston and Maine."

The statement, made in oral argument by one of the defendants, that the "court put to the jury that the only question was whether the defendants converted the money," if the charge is taken as a whole is simply not so.

[7] Mersey, because he took title, objects to being described as a middleman. It is clear on the government's evidence, however, that the cars passed through him as part of the original scheme, in order to siphon off what rightly should have gone to the railroad.

[8] For this latter reason cases such as *Heath* v. *United States,* 9 Cir., 1954, 209 F.2d 318, and *Golden* v. *United States,* 1 Cir., 1963, 318 F.2d 357, are inapposite. In *Heath* it conclusively appeared that the property had ceased to be government property before it

The indictment fully sets out the statutory offense and the basic facts charged, so that neither the grand jury nor the defendants were misled. Count 2 of the indictment charges one offense, and the evidence abundantly supports it, unless there was some error as to its admission.

The defendants duly objected to the court's instruction to the jury, near the end of the government's case, that it was warranted in considering all the evidence against all the defendants. This raises the question whether sufficient concert among them was independently shown. *Lee Dip* v. *United States,* 9 Cir., 1937, 92 F.2d 802, *cert. den.* 303 U.S. 638; *United States* v. *Olweiss,* 2 Cir., 1943, 138 F.2d 798, *cert. den.* 321 U.S. 744.

Evidence introduced by the government and independently admissible, disclosed the following. In 1957, prior to the sale of the ten passenger cars, the railroad had sold two stainless steel dining cars to Bugbee, a Texas dealer in used railway equipment. Throughout this prior transaction the railroad acted through its employee, Bolton, who was the one regularly in charge of such matters. Bugbee resold the cars to the Wabash Railroad. All of these facts were known to all of the officer defendants. On April 30, 1958[9] Bugbee saw Bolton in Boston and indicated an interest in the passenger cars. Bolton replied that they were in use and not for sale. However, on request, he took Bugbee to Glacy. Bugbee inquired if he could have an option to purchase the cars for $500,000. Glacy refused. On April 29 Glacy had received from Benson, the defendant officer in charge of such matters, a current list of equipment available for sale. These cars were not on it. We

---

was converted. In *Golden* the question was whether the property misapplied by the defendant had been delivered to him in his capacity as officer of the bank, or as a fiduciary for another.

[9] Unless otherwise noted, all dates refer to 1958.

now recite, under each defendant's name, evidence admissible at least against the stated defendant.

Mersey

Mersey's files contained a copy of Benson's "for-sale" list, dated, in Mersey's handwriting, April 30. On it was written in Mersey's handwriting, "add ten stainless cars," with a notation that Mersey was requesting prints. On May 10, after calling several times previously, Mersey reached Bugbee on the telephone, introduced himself, said he "owned" the ten cars, and offered to split with Bugbee whatever the latter could realize above $500,000. On June 25 Mersey telephoned Bugbee and reported that McGinnis had complained to Mersey that Wabash had tried to deal directly with McGinnis. Mersey stated that he had the situation in hand, and that he had told McGinnis so. Bugbee reported, in the same conversation, that Wabash would not pay more than $500,000. On July 17 Bugbee informed Mersey that Wabash's top price was $425,000.

The sale was voted on July 23, and consummated August 14. Between August 13 and December 16, Mersey made payments to the defendant officers totalling $71,500.

Glacy

Glacy, in early June, informed Bolton that the sale of the ten cars would not be handled by Bolton, but by Mersey. Bolton objected that it was his job, and raised Bugbee's prior interest. Glacy told Bolton that McGinnis wanted it handled this way. On June 26, the day after Bugbee had told Mersey that Wabash's top price was $500,000, Glacy stated in an office memorandum seeking Benson's pricing of the cars, that similar cars had been bought from the New York Central by Seaboard Airline for $20,000 to $22,000 after it had been "practically ready to buy these

coaches from us." In fact Seaboard had not been practically ready, had bought nothing from New York Central, and had bought cars, the nature of which did not appear, from the C & O for $84,000. On July 18, the day after Bugbee had told Mersey that Wabash's top figure was $425,000, Glacy informed Benson by office memorandum that he had an offer of $250,000, and requested Benson's approval. When the sale was consummated Glacy, upon releasing the cars, accepted a personal check post-dated by eight days. It was customary to require a certified check. The personal check exposed the railroad to serious risk. Mersey was already indebted to the railroad in the amount of $75,000 for a longer time than it was customary to permit, and had a bank balance of only $30,000.

Glacy received and collected payments on two checks, $12,500 each, drawn by Mersey on August 22 and 29.

Benson

Benson took Mersey to Bangor on April 30, the railroad paying the air fare. Since no railroad reason for Mersey's trip has been suggested, this indicates, at the least, some intimacy between Benson and Mersey. Benson's retained office copy of his "for-sale" list had a note attached stating that prints of the ten cars had been given Mersey on May 1. Benson, whose duties related to the sale and purchase of equipment, and who could be expected to be knowledgable, in giving Glacy a price of $30,000 on June 30, accepted Glacy's gross misstatement of the New York Central price. When Glacy, by subsequent memorandum, asked approval of $25,000 a car, Benson replied affirmatively, stating the cars were going to require heavy overhaul, at a cost of $25,000 apiece.

Benson received and collected payment on three checks drawn by Mersey on August 13, October 9, and December 16, for $5,000, $1,500, and $5,000, respectively.

McGinnis

It was McGinnis' custom, as president, to review the agenda for the directors meeting beforehand. The memorandum presented to the July 23 meeting requesting a vote on the sale of the ten cars did not name the buyer. Nor did it name the railroad officials who were endorsing the sale, but merely stated that it was recommended by "management." These lacunae were both contrary to standard practice. The sale was unanimously voted. In January 1962, McGinnis told an ICC investigator that he had been the one to present the sale to the directors. On the stand he denied this. Glacy and Benson were not directors, and if McGinnis had not sponsored the sale it does not appear who did.

McGinnis received and collected payment on three checks drawn by Mersey—two on October 10, each for $10,000, and one on December 3, for $15,000.

Each officer defendant took the stand and admitted, and sought to explain, receipt of the payments charged to him. Benson testified that his payments were for information and advice allegedly given Mersey in connection with other property Mersey had considered buying from the railroad. In making this explanation Benson, at the least, implicated himself as sufficiently intimate with Mersey to sell him information in clear breach of his fiduciary obligations to his employer.

Glacy testified that his two checks represented two years' salary for consulting services rendered to Mersey. The checks, ostensibly a week apart, were actually contiguous in the checkbook. On Glacy's testimony they represented a payment of the first year's salary nearly eight months later, and of the second year's salary four months prior to the end of the year. Furthermore, Glacy had previously received from Mersey appropriate compensation for the

first year's salary, assuming it was earned at all. As against Glacy's testimony, in January 1962 he had told an ICC inspector that he had never received payments of any description from Mersey or his company.

McGinnis testified that his payments from Mersey had been for services in connection with a transaction referred to as the Schiavone loan. The loan never went through. In January 1962 McGinnis told an ICC inspector that he had never received any payments from Mersey or his company, and specifically, that he had not received $35,000, and that although he had worked on the Schiavone loan, it had not materialized and he had received no fee. There were additional inconsistencies of record in McGinnis' courtroom explanations.

Mersey did not take the stand. His company records showed the various payments, but inconsistently with some of the defendant officers' testimony.

In sum, it could properly be found that each of the defendant officers consciously acted to facilitate the improper sale of the cars. Among other things, Glacy grossly misstated the circumstances of supposedly similar cars being bought by the Seaboard Airline; Benson, within whose expertise such matters lay, acquiesced in his statement, and in the price at which the Boston & Maine cars were ultimately sold; and McGinnis presented the matter of the sale to the board of directors in a significantly unorthodox manner. Even if there were merit in the defendant officers' contention that there was no direct evidence that any of them conspired with each other, a contention which leaves a number of matters unanswered, there was clear evidence that each conspired with Mersey. It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defend-

ants, rather than three isolated bilateral agreements. The court's ruling was amply supported.

Only one further matter merits mention. Some of the testimony damaging to the defendants came from Bugbee, whose accounts of his telephone conversations with Mersey were reinforced by introduction of transcripts of recordings made by Bugbee without the knowledge, and hence consent, of Mersey. Defendants say that the transcripts are rendered inadmissible because their divulgence would violate 47 U.S.C. § 605, the arguably pertinent portion of which reads,

> "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person. . . ."

We agree with the reasoning of the court in *Carnes* v. *United States,* 5 Cir., 1961, 295 F.2d 598, *cert. den.* 369 U.S. 861, holding the transcripts admissible. This result accords not only with the decision of the court in *Rathbun* v. *United States,* 1957, 355 U.S. 107, but, we believe, with the minority opinion as well.

Affirmed.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6652.

GEORGE F. GLACY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
May 25, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
ROGER A. STINCHFIELD
Clerk.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUN 24 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 287

PATRICK B. McGINNIS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

WILLIAM T. GRIFFIN
44 Wall Street
New York, New York
LAWRENCE R. COHEN
19 Congress Street
Boston, Mass. 02109
Counsel for Petitioner

Blanchard Press, Inc., Boston, Mass. — Law Printers

INDEX

Page

Table of Contents

Citation to opinion below 2
Jurisdiction 2
Questions presented 2
Statute Involved 3
Statement of the case 3
I. Procedural 4
A. The indictment 4
B. The trial and later proceedings 4
II. Supplementary statement of facts relating to McGinnis 5
A. Bolton 5
B. Bugbee 8
C. Bullis 10
D. The Exhibits 10

Argument

I. The trial court erred in denying McGinnis' motion to dismiss the indictment 11
II. The trial court erred in admitting as against McGinnis all the evidence originally offered and received only as to other defendants 12
III. The trial court erred in admitting certain specific evidence as to McGinnis 16
A. Documentary evidence 16
B. The hearsay testimony of Bolton and Bugbee 16
IV. The payments received by McGinnis from International were not assets of the B & M within the meaning of the statute 18
V. The requests for instructions 18
VI. Summary 19
Conclusion 19

Page

Appendix A; The opinion below 1a
Appendix B; The judgment below 11a
Appendix C; Petition for rehearing 12a
Appendix D; Order denying rehearing 19a
Appendix E; 18 U.S.C. § 660 ..... 20a

Table of Citations

Cases

Carbo v. *United States*, 314 F.2d 718 (9th Cir. 1963) ... 12
Christianson v. *United States*, 226 F.2d 646 (8th Cir. 1955) 17
Glasser v. *United States*, 315 U.S. 60 ..... 13, 17
Harney v. *United States*, 306 F.2d 523 (1st Cir. 1962) 12, 14
May v. *United States*, 175 F.2d 994 (D.C. Cir. 1949) 12, 13
Reiss v. *United States*, 324 F.2d 680 (1st Cir. 1963) .. 15
United States v. *Dennis*, 183 F.2d 201 (2nd Cir. 1950) 12

Statutes

18 U.S.C. § 656 18
18 U.S.C. § 660 ..... 2, 3, 18, 20a
28 U.S.C. § 1254(1) 2

In the
Supreme Court of the United States

OCTOBER TERM, 1966

No.

PATRICK B. McGINNIS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Patrick B. McGinnis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above case on May 25, 1966 (R. 1060).[1]

[1] Petitioner was indicted and tried together with Daniel A. Benson, George F. Glacy, International Railway Equipment Corporation ("International") and Henry Mersey. They were all convicted and the convictions were affirmed in the single judgment of the Circuit Court which is the subject of this petition. Benson and Glacy have filed separate petitions; and International and Mersey will file a single petition. A single record has been filed for all petitioners.

Citation to Opinion Below

The opinion of the Court of Appeals (R. 1051) is not yet reported. It is printed as Appendix A below at page 1a.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 25, 1966. (Appendix B, p. 11a *infra*). Petitioner filed a petition for rehearing (R. 1067; Appendix C, p. 12a *infra*) which was denied on June 10, 1966 (R. 1074; Appendix D, p. 19a *infra*). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. In a so-called "wheel", criminal conspiracy case, is evidence of the acts or statements of one of the individual defendants (a "spoke") admissible against another spoke, where there is no evidence that the latter had any knowledge of any improper relationship of the aider and abettor (the "hub") with any other person or persons.
2. Were the payments received by the petitioner from International assets of the Boston & Maine Railroad within the meaning of 18 U.S.C. Section 660.
3. Did the indictment fairly apprise the petitioner of whether he was charged with misapplying *or* converting ten railroad cars *or* the sum of $35,000 *or* $71,500.
4. Did the Court of Appeals:

   (a) Impliedly reject the government's and the trial court's theory of the independent evidence admissible against the petitioner, Patrick B. McGinnis, to establish his participation in a joint plan, and

(b) Did it err in predicating its opinion on this point on hypotheses that were completely unwarranted and unsupported by the record under consideration.

5. Did the district court judge commit reversible error in the course of the trial:

(a) By admitting against petitioner hearsay evidence of the acts and statements of Glacy and Mersey;

(b) By giving a charge to the jury which contained errors of omission and commission.

Statute Involved

The statute involved is 18 U.S.C., Section 660 which is set forth as Appendix E at p. 20a below.

Statement of the Case

This is one of four petitions filed in behalf of five respective petitioners who were affected by the judgment of the Court of Appeals. The petition of Daniel A. Benson was the first to be entered and was accompanied by the record. There is a full statement of the case in the Benson petition at pages 3 to 11 inclusive. In the interest of brevity, this petitioner will not repeat those facts which are common to both petitioners but, rather, adopts and incorporates by reference the Benson statement. This statement will include only those matters which are peculiar to McGinnis or which are necessary to clarify or modify the Benson statement as it pertains to McGinnis.

I. Procedural

A. *The Indictment.*

Count Two of the indictment charges McGinnis specifically with the following acts:

(a) In May, 1958, he and Glacy instructed subordinates not to deal with Bugbee and that Mersey was to handle the sale of the 10 cars (R. 19).

(b) He voted to approve the sale and "directed that the coaches be transferred to International at a price of $250,000."

(c) On October 10, 1958, he received $20,000 from International and a further payment of $15,000 on December 3 of that year. He withheld these "moneys" from the B & M and retained them for his own account and use (R. 20).

B. *The Trial and Later Proceedings.*

In the course of the trial the following significant developments occurred:

(a) In its opening, the Government clearly limited the alleged crime to the misapplication and conversion of money, "$71,500 which rightfully and legally belonged to the Boston & Maine Railroad, in whose property they were dealing." (R. 43).

The prosecution also stated that the evidence would show that "Mr. Glacy and Mr. McGinnis instructed Mr. George Bolton that he was not to have any dealings with Mr. Bugbee . . . ." (R. 45).

(b) At the threshold of the evidence, the Court instructed the jury that evidence could be considered

only against the defendant as to whom it was offered and admitted subject to its being tied up at a later time. (R. 50-51).

(c) Almost at the close of the government's case, the trial court admitted all evidence against all defendants. (R. 349; 359, 685-686).

(d) At the close of the government's case, and again at the close of all the evidence, McGinnis moved for acquittal. These motions were denied. (R. 729 and 715).

(e) McGinnis also moved to strike certain evidence and for a mistrial. (R. 730 and 351). These were predicated on the theory that the Court should not have admitted much of the evidence against McGinnis (R. 351). He also moved to compel the government to elect between inconsistent allegations in the indictment (R. 731).

After the verdict, McGinnis renewed his motion for judgment of acquittal and, in the alternative, for a new trial.

II. Supplementary Statement of Facts Relating To McGinnis

A. Bolton.

On October 8, 1965, as its first witness of substance, the government called George H. Bolton. He testified about the visit of Bugbee on April 30 of 1958. Later, early in June, he had a conversation with Glacy about the ten cars. Glacy instructed him that the cars were to be sold to Mersey. When the witness offered "at the time I didn't like it and I questioned him about them," counsel for McGinnis objected. The Court then asked Bolton what he said on that occasion to which he replied, "I asked him